Supreme Court, U.S.
FILED
MAY 2 2 2003
OFFICE OF THE CLERK

No. 02-1304

In the

Supreme Court of the United States

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court impose upon the state a unique, restrictive version of the public trust doctrine that is incompatible with the state's own doctrine and with the decisions of this Court upon which the state's doctrine is premised?

2. Whether a federal court may modify a state's long-established public trust doctrine and declare the doctrine a "background principle of the state's law of property" that allows local governments to preclude any economic use of private tidelands that interferes with public recreation without incurring an obligation to pay just compensation.

3. Whether a substantive due process claim is categorically barred when the alleged violation may be partially addressed by a claim for just compensation under the Fifth Amendment, even when the facts and theory relevant to the due process claim differ from the facts and theory applicable to the takings claim.

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Esplanade Properties respectfully files this Reply to the Opposition to Esplanade Properties' Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Respondent's opposition fails to recognize the importance of resolving the federal questions presented in this case.

ARGUMENT

I

THIS CASE RAISES A CRITICAL NATIONAL ISSUE AS TO WHETHER FEDERAL COURTS MAY COMPEL A STATE TO APPLY A VERSION OF THE PUBLIC TRUST DOCTRINE MORE HOSTILE TO PRIVATE PROPERTY RIGHTS THAN THE STATE'S OWN VERSION

Respondent's opposition argues that the decision below raises no issue of importance because the Ninth Circuit correctly applied Washington State law in concluding that the public trust doctrine barred Esplanade's claim for just compensation. This Court need not engage in a comprehensive review of Washington State law to see that this is untrue.

The Washington Shoreline Management Act (SMA) does not bar private uses, including residential development, on tidelands. In their opposition brief, Respondent concedes that city regulations designed to implement the SMA allowed "above-water residential construction of residences" on Esplanade's property. Opp. at 2. Respondent then admits that "Washington courts have . . . recognized that the [public trust] doctrine finds expression" in the SMA. *Id.* at 8. If so, the state's public trust doctrine does not preclude residential

development of tidelands because such development diminishes public recreation on those same lands, as the Ninth Circuit concludes.

Even aside from the SMA, Respondent does not dispute that the state has historically permitted the acquisition and development of first-class tidelands by private parties. *See* Opp. at 9. Respondent erroneously suggests, however, that such development has been restricted to wharfing and docking uses. This ignores Washington decisions that have allowed or recognized a great variety of development, including residential development, on tideland parcels in the very area at issue in this case. *See, e.g., Eastlake Cmty. Council v. Roanoke Assoc., Inc.*, 513 P.2d 36 (Wash. 1973) (condominium project on Seattle shoreline approved as consistent with public trust); *Portage Bay-Roanoke Cmty. Council v. Shorelines Hearings Board*, 593 P.2d 151, 153 (Wash. 1979) (state's "public benefit" doctrine permitted Seattle to approve "substantial development" of floating homes and dryland parking).

Orion v. State of Washington, 747 P.2d 1062 (Wash. 1987), did not repudiate the state's legal tradition permitting some development of first-class tideland parcels. It only held that the dredging, filling, and reclaiming of 5,600 acres of a state-designated estuarine sanctuary, zoned for aquatic uses, was inconsistent with the public trust doctrine. *See Orion*, 747 P.2d at 1073.

The state's measured understanding—allowing development of parcels within an industrial harbor area, while precluding wholesale destruction of a fragile bay—does not go far enough for the Ninth Circuit. That court concocted and applied a version of the public trust doctrine that logically precludes *any* development project that interferes with public recreation on *any* tidelands, without reference to their zoning classification, historical treatment, size, location, or the impact of the project on remaining public trust lands. *See* Petitioner's

Appendix at A-16. Private interests that previously included the ability to make some developmental use of first-class tidelands are swept away by judicial fiat.

Having stripped all private developmental right from Esplanade's title, the Ninth Circuit dismissed Esplanade's claim that the City caused a taking by preventing it from making any economically viable use of its property. But no Washington State decision ever held that a federal takings claim is totally barred simply because it arises from tidelands. The closest case–*Orion*–refused to decide whether "the public trust doctrine precludes Orion's takings claim in its entirety." Instead, it remanded for consideration of "whether Orion's property, burdened by the trust, is functionally and economically adaptable to some present, possible and reasonably profitable use." 747 P.2d at 1073. In other words, a takings claim may be possible in spite of, or consistent with, Washington's public trust doctrine.

Once again, the state's interpretation does not go far enough for the Ninth Circuit. Using the rubric of the "background principles" concept articulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), the court insulates Washington governments from regulatory takings claims arising from tidelands. *See* Pet. App. at A-15 (stating that *Lucas* "effectively recognized the public trust doctrine" as a "background principle" that bars Esplanade's takings claim). An inquiry into whether tidelands are amenable to some viable and possible use[1] is no longer necessary to

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[1] Given Washington State history, a careful inquiry would have shown that Esplanade's property was amenable to the very use it sought. But even a perfunctory inquiry would have shown that it was amenable to the type of residential uses allowed by *Eastlake*

(continued...)

resolve the takings claim; the public trust precludes the claim in its entirety. In conclusion, the Ninth Circuit informed the state that it is "obligated" to enforce this restrictive understanding of the public trust doctrine. Pet. App. at A-16.

The concern here is not that the Ninth Circuit has misapplied state law. The concern is that it (mis)used this Court's "background principle" concept to impose a public trust doctrine on the state that deprives tideland owners of interests previously respected by the state and, thus, strips these tideland owners of a cause of action under the United States Constitution. In sum, the concern is that the lower court's decision has (1) redefined state property rights in tidelands, so as to eviscerate all private developmental interests; (2) precluding tideland owners in Washington of any cause of action under the Takings Clause of the Fifth Amendment to the United States Constitution; (3) and directed the state to enforce this understanding.

These issues necessarily involve some understanding of Washington history and law, but they ultimately implicate nationally important questions of federalism and federal constitutional rights.

II

THE PETITION RAISES A VALID QUESTION CONCERNING WHETHER A LANDOWNER MAY ASSERT A SUBSTANTIVE DUE PROCESS CLAIM ALONG WITH A TAKINGS CLAIM

Respondents' opposition attacks the third question presented by the petition, dealing with whether Esplanade could

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[1] (...continued)
Community Council, 513 P.2d at 44, and *Roanoke Park Community Council*, 593 P.2d at 153.

raise a substantive due process claim,[2] by suggesting that the "facts and theory" of that claim are identical to those relevant to its takings claim. This argument misses a fundamental and inherent theoretical distinction between takings and due process claims, and misconstrues the nature of Esplanade's complaint.

Esplanade's takings claim is based on the effect of the City actions on its rights as the *owner of private property*. Its due process claim arises from the sense that the City has violated its *general rights as a citizen*. Thus, the takings claim rests primarily on the impact of the City actions on the use of Esplanade's property, while the due process claim alleges the city's dealings with Esplanade did not advance a valid purpose. While these claims may arise, in a general sense, from the same governmental actions, the facts *relevant* to each claim are different.

In its general prayer for relief, Esplanade asks for monetary damages. But it also asks for any other relief to which it might be entitled. This Court has clearly stated that invalidation of the offending action is the appropriate relief for a substantive due process violation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) ("The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages."). In any case, the Ninth Circuit did not dismiss Esplanade's due process claim because of the remedies it sought. It dismissed it because it concluded that, as a matter of law, such a claim could not be asserted when the takings

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[2] The third question presented is "Whether a substantive due process claim is categorically barred when the alleged violation may be partially addressed by a claim for just compensation under the Fifth Amendment, even when the facts and theory relevant to the due process claim differ from the facts and theory applicable to the takings claim."

claim provided more "explicit" protections. *See* Pet. App. at A-6.

III

THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The Respondent tries to suggest to this Court that Esplanade failed to avail itself of all available administrative processes. But it never raised any concern in the courts below that Esplanade's claims against the City are unripe, nor did those courts see anything in the facts sufficient to raise the issue sua sponte.

There is good reason why the parties and courts have treated the claims in this case as fit for resolution. Under the City code, residential use was "the only permissible use of the property." *See* Pet. App. at C-14. But the City's construction of its own code made clear that Esplanade could not gain approval of its proposed residential project, or any other residential development. This is because the City interpreted its shoreline regulations to prohibit on-site parking for residential above-water development. When read in conjunction with a land use code provision that required on-site parking for otherwise permissible residential development, this interpretation made it clear that Esplanade would not be able to lawfully proceed with any residential development.

At this point, any other (nonparking) compliance problems became irrelevant. Even if Esplanade satisfied all such issues, which it intended to do if the parking barrier was lifted, the contradictory parking regulations would prohibit the only viable permissible use of its property. In short, it would have been utterly futile for Esplanade to revise its plans, in the hope that changes would result in the City's approval. Because it was pointless to provide additional information on nonparking

compliance issues, Esplanade applied for a variance from the parking code, which the City refused to consider.

Given these facts, it is manifestly clear that the City will not authorize the only developmental use statutorily allowed on Esplanade's property. Therefore, like the lower federal courts, this Court can address the significant questions presented by this case on their merits. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 619-26 (2001) (claim ripe where regulations make clear the extent of permissible development); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (claim ripe where regulations showed that no developmental use was permitted on private property). And it should do so, for, if allowed to stand, the ruling below will bar Esplanade and other property owners in the same situation from ever being able to assert a valid regulatory takings claim or a claim that its due process rights have been violated.

CONCLUSION

For the foregoing reasons, the Court should grant Esplanade Properties' Petition for Writ of Certiorari.

DATED: May, 2003.

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